No. 89-478

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

SANDRA ANN CRAIG,

Respondent.

On Writ of Certiorari To The Court Of Appeals Of Maryland

Brief of Amicus Curiae On Behalf of the National Association of Counsel for Children; The National Court Appointed Special Advocate Association; The State Of Alaska, Office of Public Advocacy; and The State of Rhode Island, Office of The Child Advocate In Support of Petitioner

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Question Presented

Where individualized findings regarding the need to protect child witnesses are made and the witnesses, age four to seven, are subjected to cross examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be utilized?

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Interest of Amici Curiae

The National Association of Counsel for Children (NACC) is a voluntary, national membership organization concerned with the rights and interests of children who are the subjects of child protective, matrimonial, and custody litigation. Established in 1977, the association has over 1,100 members in 50 states. Membership is predominantly lawyers and judges, but also includes pediatricians, social workers, child psychiatrists and psychologists, law enforcement officers, and private citizens. The association issues standards and guidelines on the representation of children, holds seminars on legal proceedings affecting children, prepares training and resource materials, and publishes a quarterly newsletter, "The Guardian".

The National Court Appointed Special Advocate Association (NCASAA) is a nonprofit member organization which advocates for the best interest of abused and neglected children, and supports the development, growth and continuation of programs which recruit and train volunteers to serve as advocates for children in juvenile dependency proceedings. Presently there are 377 Court Appointed Special Advocate (CASA) programs in 47 states in this country. The CASA concept has been endorsed by the National Council of Juvenile and Family Court Judges, the American Bar Association, the United States Department of Justice, and many other private and public organizations.

The State of Alaska, Office of Public Advocacy (OPA), is the state agency which has been designated by the Alaska State Legislature to provide legal representation for children as counsel and/or guardian ad litem in child abuse and neglect cases, child custody proceedings, and in criminal matters regarding the protection of child witnesses.

The State of Rhode Island, Office of the Child Advocate (OCA) is the state agency designated by the Rhode Island General Assembly to protect the legal, civil and special

rights of abused and neglected children in state care and in day care settings.

The interest of NACC, NCASAA, OCA, and OPA, who submit this brief as *amici curiae* with the consent of the parties, goes beyond a generalized concern over the legal rights of children. The members of NACC, NCASAA, OCA, and OPA are involved in representing children throughout our country. Because we believe the case below was wrongly decided, and because it involves important questions of law which have not been, but should be, settled by this Court, and because the interests of children are directly and adversely affected by this decision, we join the Petitioner in urging the Court to reverse the Maryland court's holding that face-to-face confrontation is a prerequisite to utilizing the one-way closed circuit television procedure of Section 9-102.

Summary Of The Argument

The Court of Appeals of Maryland erred in interpreting *Coy* v. *Iowa*, 487 U.S. ___ , 108 S. Ct. 2798 (1988) so as to require that a young child exhibit "severe emotional distress" from a confrontation with the defendant prior to utilization of Maryland's statutory procedure for taking testimony via one-way closed circuit television. (pp. 4-6).

Although the specific statutory exception created by the Maryland statute is not "firmly rooted" in our jurisprudence, the strong policy of protecting children is "firmly rooted". This Court has long characterized as compelling the state's interest in protecting children from harm. Moreover, common law accommodations for young child witnesses date back to at least 1901 and include a wide variety of accommodations including 1) use of the *res gestae*, fresh complaint, and spontaneous declaration hearsay exceptions, 2) restrictions on pre-trial interviews, and 3) use of leading questions. (pp. 6-9).

Empirical research indicates that testifying in the same manner as an adult is associated with increased behavioral disturbance in children and that children are less likely to

report sexual abuse than are adults. Because authorities agree that young children are less likely to report abuse and that even if reported the chance of successful prosecution is remote, an individualized finding of inability to reasonably communicate based on expert testimony is a sufficient showing of necessity for utilization of closed circuit television. (pp. 10-16).

Closed-circuit television testimony is reliable, subject to contemporaneous cross-examination, and allows the fact-finder to view the demeanor of the witness. The totality of the circumstances surrounding the testimony determines reliability; unavailability speaks only to necessity. Many cases have stated that the Confrontation Clause is not violated where the statements admitted into evidence have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. (pp. 16-17.)

A substantial number of pre- and post-*Coy* state court decisions hold that confrontation can be curtailed after a sufficient showing of trauma. This showing is somewhat less than that trauma which would render the child psychologically unavailable. In order to protect child witnesses it is necessary that face-to-face confrontation be curtailed upon a showing that a child cannot testify without significant emotional or physical trauma. Such findings should not normally require a preliminary face-to-face confrontation demonstrating the very trauma the process is meant to obviate. (pp. 17-19).

Many authorities opine that avoiding a face-to-face confrontation between the child and the accused enhances the truthfulness of the child's testimony, so that the use of protective measures can actually further the purpose behind the Confrontation Clause. Amici request that this Court, in upholding the Maryland statute, articulate Confrontation Clause principles which validate dispensing with face-to-face confrontation upon a showing that it would enhance the truthfinding process. Such findings should not normally require a preliminary face-to-face confrontation

to demonstrate the distortion of the truthfinding process. (pp. 20-23).

Where a defendant has promised severe retribution for answering questions about what the defendant did to the child, these threats constitute a forfeiture or waiver of the defendant's right to face-to-face confrontation when a child could effectively testify face-to-face with the accused but only with experiencing severe fear associated with the threatening behavior. (pp. 24-26).

Unavailability pertains to necessity and therefore is not required for admissibility of testimony when, as under Section 9-102, there is contemporaneous cross-examination and sufficient indicia of reliability. If this Court determines that unavailability must be shown, the Court should not give unavailability the strictest literal meaning, but rather it should equate unavailability with inability to testify because of suffering significant psychological or physical harm. There is much precedent for expanding unavailability to include psychological unavailability. (pp. 26-30).

The Amici's interest extends beyond that of the Attorney General of Maryland who seeks to have the Supreme Court uphold as constitutional the Maryland statute here involved. The Amici seek an articulation of Confrontation Clause principles which would permit, or leave for review until another day, numerous variations on the Maryland statute which have been enacted by other state legislatures. (*See* Appendix).

Argument

I. The Court of Appeals of Maryland Erred In Ruling That A Young Child Must Suffer a Face-to-Face Confrontation With The Accused In Order to Demonstrate such "Severe Emotional Distress" That She Cannot Reasonably Communicate as a Prerequisite to Utilization of Maryland's Statutory Procedure For Taking Testimony Via One-Way Closed Circuit Television.

Relying on *Coy* v. *Iowa*, 487 U.S. ___, 108 S.Ct. 2798 (1988), the Maryland court below invalidated a testimony

taking statutory procedure protective of vulnerable, abused young children based on its mistaken belief that expert opinion that the children would be traumatized was an insufficient justification for utilizing one-way closed circuit television. If the Maryland Court's procedure is upheld by this Court, then a young child must be first subjected to a face-to-face confrontation with the alleged abuser and exhibit "severe emotional distress" as well as inability to "reasonably communicate" during this confrontation. *See Craig* v. *State*, 316 Md. 551, ___, 560 A.2d 1120, 1127-1128 (1989), *cert gr.*, 107 L. Ed. 2d 830 (1990).

Then the child must be re-tested to see if he or she is capable of testifying via two-way television. Only if the victim proves to be demonstrably unable to proceed using two-way television may the child finally be permitted to testify by closed circuit television as provided for in the Maryland statute. 560 A.2d at 1128.

In all likelihood, however, after being twice traumatized, the child will be permanently rendered incapable of testifying before the one-way closed circuit procedure could ever be utilized. Thus, the Maryland Court of Appeals has mandated a procedure which not only defeats the important public policy considerations of the Maryland statute, i.e. protection of the child witness from trauma, but also which is likely to cause that testimony to be lost permanently.

Although the court below was correct in concluding that individualized findings of necessity satisfy the Sixth Amendment, the court demanded far more than what is necessary in concluding that these individualized findings could not be based on expert and lay testimony other than the child's own testimony taken face-to-face with the alleged abuser.

The United States Supreme Court in *Coy* v. *Iowa*, 487 U.S. ___, 108 S.Ct. 2798, 2803 (1988) invalidated the use of a screen between the child witness and the defendant during trial but left "for another day" the question whether any exception to face-to-face confrontation should be made

on public policy grounds. Justices O'Connor and White, concurring made it clear that "a case-specific finding of necessity" would pass constitutional muster, stressed that the right to face-to-face confrontation is not absolute but only a "preference", and indicated that the majority decision did not "necessarily doom" efforts by state legislatures to protect child witnesses. 487 U.S. at ___, 108 S.Ct. at 2803-2805. Justice Blackmun and Chief Justice Rehnquist, dissenting and approving the screened testimony taking, noted that "as the many rules allowing the admission of out-of-court statements demonstrate, legislative exceptions to the Confrontation Clause of general applicability are commonplace." 487 U.S. at ___, 108 S.Ct. at 2809.

If the Supreme Court upholds the Maryland decision it would doom efforts of the Maryland legislature and the efforts of numerous other state legislatures to protect child witnesses.

A. The Public Policy of Protecting Children Constitutes A Compelling Government Interest and the Practice of Making Accommodations for Child Witnesses Is "Firmly Rooted" In Our Jurisprudence.

Despite the relatively recent vintage of state statutes promulgated to protect child witnesses, *see Coy*, 108 S.Ct. at 2803, the policies underlying these statutes of child protection and accommodation for child witnesses are "firmly rooted" in our jurisprudence. This Court has long characterized the state's interest in protecting children from harm as a compelling interest. *See, e.g., New York* v. *Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607 (1982) ("[S]afeguarding the physical and psychological well-being of a minor" is indeed a compelling state interest); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

The highest courts of the states are in accord. *E.g., State* v. *Jarzbek*, 204 Conn. 683, 700-703, 529 A.2d 1245, 1253-54 (1987), *cert. denied*, 484 U.S. 1061 (1988); *People* v. *Kahan*, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334, 258 N.Y.S.2d 391, 392 (1965) (Field, J., concurring) (characterizing society's interest in welfare of children as "transcendent"); *State* v. *Gilbert*, 109 Wis. 2d 501, 326 N.W.2d 744, 750 (1982) ("Society's increasing awareness of the needs of victim-witnesses in the criminal justice system has coincided with society's increased awareness of and growing concern about incest and child abuse, crimes that particularly affect children. The legal system must be examined to determine the traumatic effects the system may have on children who take the witness stand."); *Glendening* v. *State*, 536 So.2d 212, 218 (Fla. 1988), *cert. denied*, 109 S.Ct. 3219 (1989) (". . . . the protection of a child witness from the trauma of testifying in open court in the presence of the defendant, when it is demonstrated that there is substantial likelihood that such trauma would result, is a public policy of such importance as to justify a trial procedure that calls for something other than face-to-face confrontation.")

Common law accommodations for young child witnesses date back to at least 1901. *See* Parker, "The Rights of Child Witnesses: Is the Court a Protector or Perpetrator," 17 *New England L. Rev.* 643, 674-677 (1982); and J. Myers, *Child Witness Law and Practice* §§ 5:31-5:37 (1987).

One way in which the common law has long accommodated child witnesses is by restrictions on pre-trial interviews. *See, e.g., Hayes* v. *State*, 152 Ga.App. 858, 264 S.E.2d 307 (1980) (9-year old victim of child molestation); *Baker* v. *State*, 47 So.2d 728 (Fla. 1950) (in certain instances limits on interviews are subject to a proper exercise of judicial discretion reposed in the trial judge); *State* v. *Wise*, 101 Ariz. 315, ___, 419 P.2d 342, 344 (1966) (rape of a 10-year old child is among the "exceptional circumstances [in which] counsel should be barred from interviewing a witness"); *Mackie* v. *State*, 138 Miss. 740, 103 So. 379 (1925) (children aged seven, nine, eleven and fif-

teen who had witnessed defendant kill their mother spared pre-trial interviews).

There are numerous other ways in which accommodations for child witnesses are "firmly rooted" in our jurisprudence, such as, the allowance of the use of leading questions when a child is testifying. The Advisory Committee on the Federal Rules of Evidence expressly noted the propriety of leading questions with "the child witness or the adult with communication problems." Fed. R. Evid. 611(c), Advisory Committee's Note. Many cases approve leading questions during direct examination of children. *See, e.g., United States* v. *Rossbach*, 701 F.2d 713, 718 (8th Cir. 1983); *United States* v. *Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); J. Myers, *Child Witness Law and Practice* § 4.6, at 130 n.16 (1987) (collecting cases).

The policies underlying Maryland's one-way closed circuit television statute are at least as "firmly rooted" as the *res gestae* hearsay exception, which is often utilized as a way of obtaining a young child's testimony without having to place the child on the witness stand. A good recent example is *Commonwealth* v. *Rockwood*, 27 Mass. App. Ct. 1137, 538 N.E.2d 40 (1989) in which a mother

> "Had brought the child to a therapist, Linda Simon. Within a month or so of resumption of therapy in November, 1986, the child began to relate that she and her father slept in the same bed during the overnight visits. On at least one occasion, he had placed his hand on the child's 'private' and prompted her to 'please touch my dick.' The victim also described the molestation to Jane Zundell of the Norfolk District Attorney's sexual assault unit." *Id.* at 1138, 538 N.E.2d at 41.

The Court held that:

> "The judge properly allowed Simon and Zundell to give fresh complaint testimony. Reception in evidence of the child's complaints made four to six months after the sexual assault is well within the court's discretion. See *Commonwealth* v. *Comtois*, 399 Mass. 668, 672-673 N.9, 506 N.E. 2d 503 (1987) (nine-month-old complaint); *Commonwealth v. Amirault*, 404 Mass. 221, 228-229, 535 N.E. 2d 193 (1989) (eighteen-month-old complaint)." *Id.* at 1139-1140, 538 N.E.2d at 42 (some citations omitted).

Accord People v. *Wade*, 181 Cal. App. 2d 314, 315-316, 5 Cal. Rptr. 63, 64 (1960) ("general rule that evidence of a complaint made is inadmissible under the hearsay rule unless the alleged victim has testified to the acts which occasioned the complaint, inapplicable when the victim is too young to be a competent witness"); *State* v. *Hummel*, 132 N.J. Super. 412, 334 A.2d 52, *certif. denied*, 67 N.J. 102, 335 A.2d 54 (1975) (statement admitted under "fresh complaint rule" even though three years had elapsed since rape).

Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1984 Repl. Vol., 1988 Cum. Supp.) provides for the utilization of a closed circuit television procedure only if:

> "The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."

Clearly, this legislation provides greater protection to the accused than does the current caselaw on fresh complaint discussed above which, unlike Section 9-102, has no requirement of a specific finding of "serious emotional distress such that the child cannot reasonably communicate" and does not provide for cross-examination. In short, the government's interest in protecting children is compelling and solicitude for child witnesses is firmly rooted in our jurisprudence.

B. A Court May Base Its Finding of Necessity For the Use of Closed Circuit Television On Expert Testimony That A Child Witness' "Severe Emotional Distress" Renders Her Unable to Communicate Face-to-Face With the Accused.

It is well-established that if one were to write a handbook for perpetrators of sexual assaults, the first tenet would be to only attack young children because they are much less likely to report[1] the assault and even if reported

[1] It is estimated that the actual incidence of sexual abuse is two to fifty times higher than the 100,000 cases reported each year, largely because of the trauma of pre-trial and trial procedures for the complaining witness. De Francis, "Protecting the Child Victim of Sex Crimes Committed by Adults," 35 *Fed. Prob.* 15, 17 (Sept. 1971). A younger child is even more likely to delay in reporting the assault than is an older victim. Peters, Social Psychiatric A. 128th Annual Meeting (May 7, 1975, as reprinted in S. Katz & M. Mazur, *Understanding the Rape Victim* 190, 245 (1979).

"The American Humane Association's latest figures, which are from 1984, indicate that 200,000 cases of child sexual abuse were reported that year." B. Dziech & C. Schudson, *On Trial America's Courts And Their Treatment of Sexually Abused Children* 1 (1989).

"The point on which experts agree is that child sexual abuse is one of the most underreported of all crimes. Fewer than half of the respondents to the *Los Angeles Times* poll told a close friend or relative about their victimization within a year, and only 3 percent reported the incident to legal authorities or public agencies. This statistic is similar to Russell's findings that only 2 percent of intrafamilial and 6 percent of the extrafamilial incidents were reported to the police." *Id.* at 2.

"Victims themselves unknowingly aid in society's denial. Most disclose the incidents slowly and reluctantly over a period of weeks, months, or even years. Some live all of their lives without admitting to anyone what happened to them. Of former victims responding to the *Times* poll, 42 percent replied they told someone within a year, 21 percent said they waited more than a year, and 36 percent reported that they had told no one until asked by the interviewer. This response is indicative of the process that psychiatrist Roland Summit, after thousands of first-hand observations and consultations with professionals dealing with victims, described as the 'child sexual abuse accommodation syn-

the chance of a successful prosecution[2] is remote. The plight of a child rape or sexual assault victim has been described by The Supreme Judicial Court of Massachusetts in *Globe Newspaper Co.* v. *Superior Court*, 379 Mass. 846, 401 N.E.2d 360 (1980):

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drome.' *Id.* at 3.

Sexual abuse is under-reported. Melton, "Children's Testimony in Cases of Alleged Sexual Abuse", 8 *Advances Dev. & Behav. Pediatrics* 181-183 (1987).

According to the Federal Bureau of Investigation "only one in five of all sexual assaults are reported, and where children are involved, incidents are usually reported only when hospitals, schools or social agencies become involved." Collins, "Studies Find Sexual Abuse of Children Is Widespread," N.Y. Times, May 13, 1982, at C1, Col. 1, C10, Col. 1.

In short, statistics on reported cases of sexual assault understate the problem. Either the child does not report the incident, *see* National Center on Child Abuse and Neglect, "Child Sex Abuse: Incest, Assault and Sexual Exploitation" (1981); Landis, "Experiences of 500 Children with Adult Sexual Deviation," *30 Psychiatric Q. Supp.* 91, 99 (1956), or the parents refuse to go to the authorities, *see* Collins, "Studies Find Sexual Abuse of Children Is Widespread," N.Y. Times, May 13, 1982, at C10, Cols. 5-6.

[2] At least one study has reported that less than one percent of the offenders are ever imprisoned. N.Y. Times, May 13, 1982, at C10, Col. 5. That study compared the number of offenses committed by patients in a sexual behavior clinic. It concluded that in only 1 of 250 cases was the molester imprisoned. *Id.*

Only 50% of the sex offenders (238 men) in the Sexual Behavior Clinic at the New York State Psychiatric Institute had ever spent time in jail. These men had committed a total of 16,666 acts of child molestation, an average of 68.3 molestations per offender. N.Y. Times, May 13, 1982, at C1, Col. 1, C10, Col. 1.

"Comfortable in its ignorance, the public can avoid the challenge of Suzanne Sgroi, whose *Handbook of Clinical Intervention in Child Sexual Abuse* is a classic in its field. Sgroi reminds us that 'we tolerate sexual abuse of children in our society because we continue to process cases through an adversary system that is overwhelmingly weighted against the child victim at virtually every level.'" B. Dziech & C. Schudson, *On Trial America's Courts And Their Treatment of Sexually Abused Children* 5-6 (1989).

"The rape victim's ordeal in court has been well documented. It has been said that '[t]he court experience, for the rape victim, precipitates as much of a psychological crisis as the rape itself.' In fact, the victim may feel that she has been raped twice: once by the defendant and once by the criminal justice system. A rape victim who anticipates humiliation or embarrassment may choose not to come forward at all, or, if she comes forward, may abandon her participation midway through the case. Even if she continues to participate in the criminal process, she may become so distressed that she cannot testify effectively.

This is especially true for the child victim of rape." *Id.* at 858-859, 401 N.E. 2d at 368-369 (emphasis added).

Also see *Globe Newspaper Co.* v. *Superior Court*, 383 Mass. 838, 423 N.E. 2d 773 (1981), *rev'd*, 457 U.S. 596 (1982):

"To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience. So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial." *Id.* at 849, 423 N.E. 2d at 780.

In short, while the sexual assault itself is emotionally damaging, the ordeal of bringing criminal charges can compound the damage. Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," 15 *Wayne L. Rev.* 977, 984 (1969); *see* discussion at notes 1 and 2, *supra*.

An important factor responsible for under-reporting is the post-attack treatment of the victim by the judicial process itself. Many parents, realizing how grueling the criminal process can be, fail to report sexual assaults in order

to protect their children from courtroom trauma.[3] J. MacDonald, *Rape Offenders and Their Victims* at 128 (1971).

"[A]lthough research in this area is still in its early stage, studies of children who have testified in court indicate that such testimony is associated with increased behavioral disturbance in children." *Coy*, 487 U.S. at ___, 108 S.Ct. at 2808 (citation omitted).

If the prosecutor does decide to go ahead with the case, the victim usually must testify at a preliminary hearing, which can take a serious emotional toll on a child. The victim is often frightened at having to face the assailant again, and may be embarrassed when required to repeat the story of the attack in a public setting. *See generally* T. McCahill, L. Meyer, & A. Fischman, *The Aftermath of Rape* 170 (1979) and L. Holmstrom & A. Burgess, *The Victim of Rape* 226 (1978).

Like the preliminary hearing, the trial itself creates fear and stress for the child witness. One study of rape victims admitted to the Boston City Hospital emergency wards in 1972 and 1973 concludes:

"Overwhelmingly, both adult and *young* victims found court an *extremely stressful experience*. The features they found most upsetting (judged by the frequency with which they mentioned them) were the *cross-examination* by the defense lawyer, the *confrontation* between the accused and accuser, and the *public setting*. They also found it difficult to listen to the defendant's version of what happened and were upset when informed belatedly about the *length* of the court process." L. Holmstrom & A. Burgess, *The Victim of Rape* 222 (1978). (emphasis added).

One researcher, investigating what troubled witnesses about the criminal justice system, found that:

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[3] Shortly after testifying in the same manner as an adult, one of the children who was represented by one of the writers of this brief committed suicide.

> "the most frequently mentioned fear was facing the defendant. That experience is frightening . . . to a child who does not understand the reason for confrontation. [T]hat participation and experience of being in close proximity to the defendant can be overwhelming."

D. Whitcomb, E. Shapiro and L. Stellwang, "When the Victim is a Child; Issues for Judges and Prosecutors," National Institute of Justice, 17-18 (1985).

Consistent with the above discussed studies, there were specific findings in the instant case, by the expert witnesses, concerning each of the children's inability to testify.[4] The findings were similar to those required for proof of an adult witness's inability to testify, *see Warren* v. *United States*, 436 A.2d 821 (D.C. App. 1981) and similar

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[4] Mary Burke, a treating child therapist with the Howard County Sexual Assault Center, testified that it would be difficult or impossible for the victim Brooke Etze to sit in the same room with Sandra Craig, and that the fear and anxiety would manifest itself by disruption in her breathing and that she would curl up in a ball and be unable to proceed. (E.75, 76,80,85). Ms. Burke, also testified that Justin Peeples, age five, another child victim of Craig, "would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure." (E.77). According to Ms. Burke, in order to avoid impairing Justin's ability to communicate and to maximize the opportunity of adducing the child's testimony, it would be necessary "to remove the threatening agent which he perceives as Mrs. Craig." (E.78). Ms. Burke also testified that Jessie Sue Smith age four, in light of threats made by Mrs. Craig, would be unable to testify in front of Ms. Craig. Dr. Gladys Sweeney testified that the fourth child witness, Drew Woodbury age five, exhibited extremely regressive behavior when talking about Craig's sexual abuse (E.95-99) and opined that Drew's "ability to communicate would be grossly impaired if he were to testify in an open court in the presence of Mrs. Craig." (E.94). Hence, expert opinion established that all four child witnesses would experience "severe emotional distress' stemming from the presence of the defendant during their attempt to testify. Implicit in the above testimony by the therapists who examined four of Craig's victims is the likelihood that each of the children might break down if forced to confront Craig face-to-face and thereafter become incapable of testifying even via one-way closed circuit television.

to what has been required to establish a child's inability to testify, *see People* v. *Stritzinger*, 34 Cal. 2d. 505, 194 Cal.Rptr. 431, 668 P.2d 738 (1983); Comment, "LB90 and the Confrontation Clause: The Use of Videotaped and In Camera Testimony in Criminal Trials to Accommodate Child Witnesses," 68 *Neb. L. Rev.* 372, 407 (1989); J. Myers, *Child Witness Law and Practice*, § 5.27 at 311 (1987) (collecting cases).

That the child's fear of testifying in the presence of the defendant may be compounded by testifying in an imposing courtroom filled with strangers is irrelevant. As long as the presence of the defendant is a significant factor in rendering the child mute, there is no reason why it need be the sole factor. *See Kentucky* v. *Stincer*, 482 U.S. 730 (1987) (no right to confrontation at a competency hearing).

The Maryland State Legislature had ample support in respectable current research to conclude that: 1) face-to-face confrontation has the potential to cause serious emotional distress in young children, sometimes rendering children unable to reasonably communicate, 2) that the prospects of emotional distress and inability to testify face-to-face dissuade children, their families and the state from pursuing justice for child victims in the criminal process, 3) that actual attempts to testify face-to-face need not be made in order for a judge to determine the inability of an individual to reasonably communicate because of that severe emotional distress, and 4) that testifying by closed circuit television, not preceded by a paralyzing preliminary confrontation, would lessen the trauma faced by child victims who attempt to testify and encourage those victims who in the past have not come forward, to pursue justice in the criminal courts, serving the general protection of children.

There is no reason based on current knowledge in the field for this Court to second guess these legislative findings of fact. The Amici urge this Court to determine that these legislative findings establish the requisite level of necessity to legitimate the use of closed circuit television

pursuant to the process enacted by the legislature of Maryland.

C. The Statutory Condition That A Child Be Found Unable to Reasonably Communicate Satisfies The Unavailability Requirement If Such A Requirement Is Imposed By This Court.

1. The Confrontation Clause Does Not Demand A Showing of a Child's Unavailability As A Precondition To the Admission of Testimony Taken By Closed Circuit Television and Subject to Contemporaneous Cross-Examination.

Closed-Circuit television testimony is reliable, subject to contemporaneous cross-examination, and permits the fact-finder to view the demeanor of the witness. Only reliability, not unavailability, is the pre-requisite to the admission of many forms of hearsay. Requiring unavailability does nothing to promote reliability which is instead determined by the totality of the circumstances.

In *State* v. *Roy*, 214 Neb. 204, 333 N.W. 2d 398 (1983), the Nebraska Supreme Court stated that the Confrontation Clause is not violated where the statement admitted into evidence has sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. The court stated: "[T]he mission of the confrontation clause is to advance practical concern for the accuracy of the truth determination process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement." *Id.* at 207, 333 N.W. 2d at 401.

In *Roy*, the court affirmed the defendant's conviction of first-degree sexual assault upon his 2-year-oid stepdaughter. The court found that admission of an excited utterance by the child was permissible. It concluded that the age of the victim, her battered physical condition, the nature of the event, and the child's fear of additional injury (i.e. the totality of circumstances) provided a sufficient basis of reliability for the child's statement to qualify as an acceptable exception to the hearsay rule.

What is pertinent to the admission of many forms of children's hearsay statements is not whether or not the child could testify face-to-face with the accused but instead whether the statement is reliable based on the totality of the circumstances, a multi-factored test. *See, e.g., State* v. *Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987) (substance of statement corroborated by other evidence, spontaneity, consistent statements and statement elicited by questioning); *Morgan* v. *Foretich*, 846 F.2d 941 (4th Cir. 1988) (substance of statement corroborated by other evidence, spontaneity, statement indicates unusual knowledge of sexual acts or anatomy); *State* v. *Conklin*, 444 N.W. 2d 268, 276 (Minn. 1989) (spontaneity, lack of incentive of adults to fabricate allegations); *State* v. *Kuone*, 243 Kan. 218, 757 P.2d 289, 292 (1988) (consistent statements, lack of motive to fabricate); and *State* v. *Sorenson*, 143 Wis. 2d 226, 421 N.W. 2d 77, 85, 87 (1988) (statement indicates unusual knowledge of sexual acts or anatomy, use of terminology to describe sexual abuse that one would expect from a child of similar age, and accused had opportunity to commit act).

Moreover, under procedures like the Maryland procedure there is the additional safeguard that the child's testimony is subject to cross-examination. *See, e.g., Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965) ". . . that a primary interest secured by it [the confrontation clause] is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."

a. A State May Curtail Face-to-Face Confrontation Upon a Showing That A Child Would Endure Severe Trauma In Testifying Effectively.

A substantial number of pre- and post-*Coy* state court decisions hold that confrontation can be curtailed after a sufficient showing of trauma. This showing is somewhat less than that trauma which would render the child psychologically unavailable. *See Glendening* v. *State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, 109 S. Ct. 3219 (1989); *Brady*

v. *State*, 540 N.E.2d 59 (Ind. App. 1989); *State* v. *Hoversten*, 437 N.W.2d 240 (Iowa) *cert. denied*, 110 S.Ct. 212 (1989); *In re J.D.S.*, 436 N.W.2d 342 (Iowa 1989); *State* v. *Chisholm*, 245 Kan. 145, ___, 777 P.2d 753, 758-59 (1989) (*Coy* does not "require the trial court to specifically find that the child's trauma is so great the child cannot reasonably communicate and therefore is unavailable as a witness"); *State* v. *Eaton*, 244 Kan. 370, 769 P.2d 1157 (1989); *State* v. *Albert*, 13 Kan. App.2d 671, 778 P.2d 386 (1989); *State* v. *Thomas*, 150 Wis. 2d 374, 442 N.W.2d 10 (1989). These cases reflect the state's compelling interest in protecting capable child witnesses from undue harm.

Analyzing Craig's Confrontation Clause challenge in the light of *Coy*, the Court of Special Appeals of Maryland emphasized the State's interest in protecting children from trauma:

> "[T]he State has an interest in protecting children generally from trauma, especially trauma that would result from the deliberate action of the State itself. Keeping in mind the threshold requirements in § 9-102, what is to be gained from forcing a child-victim to testify in the direct presence of the defendant when the only product of it will be further suffering for the child rather than any meaningful evidence—*inculpatory* or *exculpatory*." *Craig* v. *State*, 76 Md. App. 250, ___, 544 A.2d 784, 800 (Md. App. 1988).

In comparison to adults, children run a greater risk of experiencing negative effects from testifying in court because they are less likely than adults to have the cognitive skills necessary to organize the experience. *See Ward*, "The Child as Witness," 4 *Family Advocate* 14 (Sept. 1982) and Melton, "Children's Competency to Testify," 5 *Law and Human Behavior* 73, 110 (1981). Also see, Part B *supra*. It is undoubtedly true that many children are traumatized by involvement in the legal system, and in particular by testifying before the defendant. *See Commonwealth* v. *Amirault*, 404 Mass. 221, ___, 535 N.E.2d 193, 206 (1989) (child's therapist "testified that the child became more

anxious, concerned, and aggressive as he prepared to testify in court." The boy was reluctant to talk about his abuse at day care, and "reacted to the topic by holding his knees up, covering his eyes, clenching his fists, and grinding his teeth") and *State* v. *Albert*, 13 Kan. App. 671, 778 P.2d 386 (1989) (child's therapist of six months opined that testifying would be very difficult for child, who had a serious ulcer and who cried every time the subject of testifying was brought up).

Unavailability pertains to necessity and therefore should not be required for admissibility of testimony when there is contemporaneous cross-examination and other sufficient indicia of reliability and placing the witness before the accused is precisely the harmful situation to be avoided. *See, e.g., United States* v. *Inadi*, 475 U.S. 387 (1986).

> "*Ohio* v. *Roberts* did not stand for the radical proposition that no out-of-court statement can be introduced . . . without a showing that the declarant is unavailable.' In the Court's analysis [in *Inadi*], such an interpretation adds nothing to the determination of the truth in a case, which is the object of the confrontation clause." Dziech & Schudson, *supra* n.1 at 138.

..mici concede that the Maryland statute does not permit dispensing with face-to-face confrontation when a child who will be severely traumatized can, nevertheless, effectively testify. Amici pray that this Court, in upholding the Maryland statute, nonetheless articulate Confrontation Clause principles which validate curtailing face-to-face confrontation upon individualized showings that a child can testify but only at great personal expense in terms of serious emotional or physical trauma. Such findings should not normally require a preliminary face-to-face confrontation demonstrating the very trauma the process is meant to obviate.

b. A State May Curtail Face-To-Face Confrontation When It Would Undermine The Trustworthiness Of The Child's Testimony.

This Court's decisions

> "... make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier' of fact [has] a satisfactory basis for evaluating the truth of [any out of court statement]". *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970), quoting *California* v. *Green*, 399 U.S. 149, 161 (1979).

See Coy, 487 U.S. at ___, 108 S. Ct. at 2802, quoting *Kentucky* v. *Stincer*, 482 U.S. 730, 736 (1987) ("the right to face-to-face confrontation" [exists in part to] " 'ensur[e] the integrity of the fact-finding process' ". "Thus, the priority accorded the right to face-to-face confrontation in *Coy* turned not on its intrinsic inviolability but rather on its functional value in enhancing the fact-finding process of criminal trials." *State* v. *Bonello*, 210 Conn. 51, 554 A.2d 277, 282, *cert. denied*, 109 S. Ct. 2103 (1989). *See also Ohio* v. *Roberts*, 448 U.S. 56, 64 (1980).

As was recently discussed by the Georgia Court of Appeals, a face-to-face confrontation between the defendant and the child witness more likely than not will inhibit the revelation of the truth:

> "In many cases, to require eye-to-eye contact between the victim and the appellant would not only be intimidating and very possibly exacerbate the damage done them, but it also serves no meaningful purpose in the search for truth." *Ortiz* v. *State*, 188 Ga. App. 532, 374 S.E.2d 92, 95 (1988).

See Commonwealth v. *Ludwig*, 531 A.2d 459, 467 (Pa. Super. 1987), *app. gr.*, 518 Pa. 617, 541 A.2d 744 (1988) (Tamilia, concurring):

> "It requires no expert testimony to establish that a child in an adult courtroom, subject to the most cre-

> ative and stressful means of getting to the truth, will react not as an adult but as a child. *While this procedure is calculated to arrive at the truth with an adult, a child can only be expected to respond with emotional and physical reactions derived from terror.* For a child not to "freeze" is unusual and to present a clear unequivocal statement of the occurrence is even more unusual. If the constitution may be interpreted broadly enough to deny them the right of adults for their protection and in their best interests (denial of jury trial, denial of emancipation, right to contract, etc.), it can also be extended to soften (not eliminate) the harshness of their testifying in court for the same reason the juvenile acts, dating from 1898, universally adopted throughout the country, are testimony to this recognition. To do otherwise is to provide a defendant charged with sexual or other child abuse with an overwhelming advantage (inconsistent) with equal justice." *Id.* at 467 (emphasis added).

See also State v. *Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330, 1332 (1984) in which a recognized expert in forensic psychology testified:

> "[T]he victim has the capacity to testify truthfully. It was [the doctor's] opinion, however, that *avoidance of an in-court appearance through the use of video equipment would improve the accuracy of her testimony.* He provided reasons: An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of the black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child. . . . The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony." *Id.* at 1332. (emphasis added).

Additionally, empirical research suggests that physical confrontation with the defendant may even damage the reliability, quality, and often the very existence of the

child's testimony. Hill and Hill, "Videotaping Children's Testimony: A Empirical View," 85 *Mich. L. Rev.* 809, 820 (1987).

As Justice Blackmun noted in his dissent in *Coy* v. *Iowa*, 487 U.S. at ___, 108 S.Ct. at 874, the use of protective measures can actually enhance the reliability of the testimony of child sex abuse victims. Also see, B. Dziech & C. Schudson, *On Trial America's Courts and Their Treatment of Sexually Abused Children* (1989):

> "In courtrooms witnesses are judged on the basis of juries' perception of qualities like truthfulness, trustworthiness, certainty, and confidence. It seldom occurs to most people that some hardened criminals or pathological liars may be more likely than innocent people to appear honest, trustworthy, and self-confident. Children are not likely to look directly or long at a strange judge or a hostile attorney because they are frightened and because they have been instructed from infancy to avoid strangers. Yet few jurors consider that children's avoidance reactions may not be dishonesty but rather shyness, fear, and other predictable qualities that are heightened by their inexperience and impotence in the legal system." *Id.* at 66.

. . . .

A child intimidated into silence by the traditional court process is a far greater danger to an innocent defendant than is one who communicates confusion or untruth. Silence can be interpreted as fear of the defendant when it may, in reality, be reluctance of the child to be trapped in a lie. The best defense against false allegations by children is implementation of procedures that will increase their participation in the legal process. To establish that the innocent are being persecuted because of malicious stories from devious children, one must first allow the children to tell their stories; and if the telling is contingent upon puppets or laps or even a television camera, it is

preferable to little or no testimony at all." *Id.* at 18-19.

Thus, in addition to protecting the child witness from emotional trauma, the procedures utilized by the trial court furthers a second important interest—that of enhancing the truth-determining process of criminal trials. *See Wildermuth* v. *State*, 530 A.2d 275, 283-284 (Md. 1987); *State* v. *Tafoya*, 108 N.M. 1, 765 P.2d 1183, 1186 (1988), *cert. denied*, 109 S.Ct. 1572 (1989); and *State* v. *Bonello*, 210 Conn. 51, 554 A.2d at 281-282. Indeed, lack of trustworthiness (as opposed to unavailability of the witness or trauma to the witness) is the test for invoking the Connecticut videotaping statute. *See, e.g., State* v. *Jarzbek*, 204 Conn. 683, 529 A.2d 1245, 1255 (1987), *cert. denied*, 484 U.S. 1061 (1988) ("the minor victim would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that the trustworthiness of the victim's testimony would be seriously called into question.")

Of course, the younger the child, the more likely it is that confrontation with the accused will inhibit, rather than foster, the truthfulness of the child's testimony, especially since commonly children are told that if they tell, their parents won't love them anymore, their parents will die, they will be killed, or they will get in trouble. *See, e.g., State* v. *Sheppard*, 197 N.J. Super. 411, 484 A.2d at 1332.

Amici concede that there was no finding in the instant case regarding the use of closed circuit television to enhance the truthfulness of given testimony. Indeed the Maryland statute does not seem to contemplate such an inquiry. Amici pray that this Court, in upholding the Maryland statute, articulate Confrontation Clause principles which validate dispensing with face-to-face confrontation upon an individualized showing that it would enhance the truthfinding process. Such findings should not normally require a preliminary face-to-face confrontation to demonstrate the distortion of the truthfinding process.

c. The Accused's Threat to the Child Witness Represents a Forfeiture or Waiver of the Right to Face-to-Face Confrontation.

The accused's threatening conduct would justify dispensing with face-to-face confrontation even when a child could effectively testify face-to-face with the accused but only with experiencing severe fear associated with the threatening behavior. Where a defendant has promised severe retribution for answering questions about what the defendant did to the child, the defendant has forfeited his right to face-to-face confrontation. *See United States* v. *Carlson*, 547 F.2d 1346, 1359 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977) (waiver of confrontation by threatening or intimidating witnesses; "the Sixth Amendment does not act as a shield to protect the accused from his own misconduct or chicanery").[5] It is already a well-established rule of law that a defendant waives his right to confrontation should he cause a witness to be unavailable or incapable of testifying: "[a]ny other result would mock the very system of justice the Confrontation Clause was designed to protect." *United States* v. *Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984). *See also United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982); *United States* v. *Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980); *Black* v. *Woods*, 651 F.2d 528 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981); *State* v. *Jarzbek*, 204 Conn. 683, 529 A.2d 1245, 1252-53 (1987), *cert. denied*, 484 U.S. 1081 (1988); *State* v. *Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984).

The Amici ask that this rule apply to situations in which the accused's threatening conduct is such that face-to-face

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[5] Waiver of the right of confrontation is also found in a number of other situations. *See, e.g.*, *Williams* v. *Oklahoma*, 358 U.S. 576 (1959) (waived by a defendant stipulating to the admission of certain evidence); *Boykin* v. *Alabama*, 395 U.S. 238 (1969) (a defendant who pleads guilty waives his right to confrontation); *Illinois* v. *Allen*, 397 U.S. 337 (1970) (engaging in disruptive behavior in the courtroom as waiver).

confrontation during testimony would unduly exacerbate the child's fear. The importance of the Court's consideration of the dynamics of a defendant's relationship to a child witness was observed by the dissenting justices of the Georgia Court of Appeals in *Glisson* v. *State*, 188 Ga. App. 152, 372 S.E.2d 462 (1988):

> "The victim, often the only witness able to establish the evidence necessary for a conviction may be intimidated into silence out of fear of reprisal. . . . Conviction for these reprehensible offenses should not be thwarted by the accused's emotional and psychological control over the victim. The offense in these cases, as in any other crime, is not just against the victim but against the laws, good order, peace and dignity of the state. When reliable evidence is available to sustain a conviction, it must not be excluded. Justice is blind, but not dumb." *Id.* at 462.

In explaining the basis for her opinion that "it would be very difficult if not impossible to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents," (E.75), Mary Burke, a child therapist with the Howard County Sexual Assault Center, who had conducted twenty therapy sessions with Brooke each lasting one to one and one-half hours (E.74) said that Brooke perceives "that she was threatened by Mrs. Craig and that she feels that her life is in jeopardy and part of her family and the household pet." (E. 75-76). Ms. Burke also commented that Brooke "truly believes that those threats will be carried out against her." (E. 75). Similar findings were made concerning other child-victim-witnesses: Justin Peeples, age five, sees Mrs. Craig "as a threatening figure" (E.77) and Jessie Sue Smith, age four, perceives Craig as a threat to herself, her parents, and her siblings (E.80). She believes that Mrs. Craig is capable and willing to carry out those threats at home and Jessie is fearful of this person. *Id.*

Here the therapists' testimony based on numerous therapy sessions establishes that the children feared serious reprisals from Mrs. Craig including fearing for their lives

and fully believed that Mrs. Craig was capable of carrying out these threats. Surely these children are entitled to the same protection given the adult government witness in *Carlson*.

The Amici concede that the trial court did not make a finding that Craig's threats created a forfeiture of face-to-face confrontation rights. This could have been and remains an alternative ground for upholding the trial court's dispensing with such confrontation. In the event this Court upholds the Maryland statute as written, Amici pray that this Court articulate Confrontation Clause principles which validate dispensing with face-to-face confrontation upon individualized findings that an accused's threats to a child witness would cause the child to experience severe fear of harm or retribution if forced to testify in the accused's presence.

2. A Trauma Induced Inability to Testify Face-to-Face With The Accused Constitutes Unavailability for Confrontation Clause Purposes.

As indicated by *Coy*, the Supreme Court of the United States has said that while the Sixth Amendment reflects a preference for a face-to-face confrontation at trial, the preference is not absolute and inelastic. The Confrontation Clause of the United States Constitution does not preclude the use of hearsay evidence in criminal trials under circumstances which otherwise render such evidence reliable, *i.e.*, where it bears sufficient 'indicia of reliability.' *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980) (involving former testimony of unavailable witness). *See United States* v. *Inadi*, 475 U.S. 387 (1986) (statement of co-conspirator); *Dutton* v. *Evans*, 400 U.S. 74 (1970) (statement of co-conspirator); *Mattox* v. *United States*, 156 U.S. 237, 242-244 (1895) (former testimony); *Williams* v. *Melton*, 733 F.2d 1492 (11th Cir. 1981), *cert. denied*, 469 U.S. 1073 (1984) (out-of-court statements of witnesses falling under *res gestae* exception); *Haggins* v. *Warden*, 715 F.2d 1050 (6th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984) (excited utterance); *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983) (statement of co-conspirator).

If the Court were to determine unavailability must be shown then unavailability should not be given the strictest literal meaning, but instead be equated with inability to testify because of suffering significant psychological or physical harm. For example, the 1972 United States Supreme Court case of *Mancusi* v. *Stubbs*, 408 U.S. 204, 206 (1972) held that if a witness is unavailable to testify, it is not a denial of the right to confrontation to allow into evidence prior recorded testimony of a witness where the defendant has had an adequate opportunity to cross-examine the witness. Hence, admission of former testimony has been upheld over a challenge of unconstitutionality in a variety of contexts including: death of the witness, *People* v. *Behm*, 49 Ill. App.3d 574, 580, 364 N.E.2d 636, 641 (1977), prosecution's inability to locate the witness, *People* v. *Contreras*, 57 Cal. App.3d 816, 820, 129 Cal. Rptr. 397, 400 (1976); *People* v. *Fink*, 37 Colo. App. 512, 552 P.2d 529, 531 (1976), rev'd, 194 Colo. 516, 574 P.2d 81 (1978); alleged loss of memory of the witness, *State* v. *Thomas*, 110 Ariz. 120, 126, 515 P.2d 865, 870 (1973), witness's refusal to testify on grounds of fear for the safety of his person and of his family, *People* v. *Rojas*, 44 Cal. App. 3d 978, 119 Cal. Rptr. 144 (1975), witness's pregnancy, *Lamb* v. *State*, 560 P.2d 583 (Okla. Crim. 1977), and psychological unavailability of the witness, *People* v. *Gomez*, 26 Cal. App.3d 225, 231, 103 Cal. Rptr. 80, 84 (1972).

Similarly, two federal circuit court cases have found that the invocation of the fifth amendment privilege against self-incrimination constitutes sufficient unavailability. *Phillips* v. *Wyrick*, 558 F.2d 489, 494 (8th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978); *United States* v. *Brasco*, 516 F.2d 816 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975). In addition, Section 804(a)(1) of the Federal Rules of Evidence defines "unavailability" as including the situation where the declarant is exempted from testifying on the ground of privilege.

Flexibility in the unavailability test under the Confrontation Clause is also supported by the judicial recognition that the legislature is free to provide for depositions to

perpetuate testimony without fear of infringing on the defendant's confrontation rights. For example, the Supreme Court of Appeals of Virginia in *Setliff* v. *Commonwealth*, 162 Va. 805, 173 S.E. 517 (1934) found Virginia's statute, which provides for a deposition to be read into evidence in rape cases, to be well within constitutional limits. *Accord United States* v. *King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) which upheld the constitutionality of the federal criminal deposition statute, Fed. R. Crim. P. 15, 18 U.S.C. §3503 (1976).

Moreover, that the hearsay rule is not violated by admitting the out-of-court statement of a psychologically unavailable witness is supported by *Commonwealth* v. *Stasko*, 471 Pa. 373, 370 A.2d 350 (1977). In *Stasko*, the Supreme Court of Pennsylvania held that, under the circumstances, the trial court properly permitted the prosecution to take and use at a trial a videotaped deposition of an eyewitness whose health did not permit a court appearance. The witness saw a co-employee being murdered in the parking lot after work. She had had numerous abdominal operations for regional ileitis and ulcerative colitis and her doctor thought that the emotional strain of her appearance would gravely aggravate her condition.

Creating a new category of unavailability (psychological unavailability), for which the legislature finds compelling policy reasons in light of the emotional vulnerability of child witnesses, will not violate the Confrontation Clause. Two recent federal cases support this assertion. First, in *United States* v. *Nick*, 604 F.2d 1199 (9th Cir. 1979), the defendant unsuccessfully appealed his conviction of sexual assault on a 2-year-old child alleging that the trial court erred in admitting, over hearsay and Confrontation Clause objections, damaging statements of the victim reported in the testimony of the child's mother and his physician. Second, in *United States* v. *Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), the trial court's admission of the 9-year-old assault victim's statement to her doctor and to the police officer was upheld. The Eighth Circuit court reasoned:

> "It has been recognized, however, that even though a declarant is available to testify, the confrontation clause protection may be called into question because the declarant is too young to be subjected to a thorough cross-examination as envisaged by the constitution .... This principle was also recognized in *California* v. *Green* where the court remanded the case for a determination of whether 'the nature of the opportunity to cross-examine' was dispositive of the confrontation issue. *These cases recognize a special type of "unavailability" for purposes of the confrontation clause* .... Nevertheless, assuming arguendo that Lucy was *unavailable* in the sense suggested by the *Nick* court, we conclude that the confrontation clause was not violated ...." *Id.* at 87 (citations omitted) (emphasis added).

Thus, the Eighth and Ninth Circuit court opinions relied upon special notions of unavailability to admit out-of-court statements by a young child into evidence.

Moreover, if a witness may be rendered unavailable by mere lack of memory, *see, e.g.*, Fed. R. Evid. 804, Advisory Committee's Note, at 144 (West 1975) or by simple refusal to testify, *see, e.g.*, *Johnson* v. *People*, 152 Colo. 586, 384 P.2d 454 (1963), *cert. denied*, 376 U.S. 922 (1964); *People* v. *Pickett*, 339 Mich. 294, 63 N.W. 2d 681 (1954), *cert. denied* 349 U.S. 937 (1955), in situations for which there is no public policy reason for protecting the witness, it seems inappropriate to bar the child's cross-examined statements where there are strong policy reasons for allowing it into evidence.

A growing number of pre- and post-*Coy* state court decisions hold that confrontation may be withheld when a face-to-face encounter would render the child unavailable as a witness. *See State* v. *Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989); *State* v. *Twist*, 528 A.2d 1250 (Me. 1987); *State* v. *Conklin*, 444 N.W.2d 268 (Minn. 1989); and *State* v. *Taylor*, 562 A.2d 445 (R.I. 1989).

In *Craig* there was sufficient expert testimony that the four child witnesses would be psychologically traumatized by the presence of the defendant rendering them unable to reasonably communicate. See footnote 4, *supra*. Therefore, each of the children were unavailable as the defendant's presence, according to the expert testimony, was a significant factor in the experts' opinion that each of the children would be rendered unable to reasonably communicate. Indeed, while it is asking too much as criteria for admissibility to establish unavailability, the Maryland Court does determine that there is "psychological unavailability." *Craig*, 560 A.2d at 1126.

CONCLUSION

By erroneously and illogically requiring the child to be exposed to the very psychological and physical trauma that Section 9-102 was intended to minimize, the Maryland Court of Appeals has defeated its legislature's goal of protecting children and the criminal process's mission of ferreting out the truth. The Maryland Court's interpretation of Section 9-102 should be reversed to the extent that it requires face-to-face confrontation prior to utilizing Section 9-102. Expert or lay testimony is sufficient. Likewise, the court's limitation of the reason behind the child's inability to communicate to solely the fear of the defendant must be reversed.

Like the apple in "Snow White and the Seven Dwarfs" the current court procedures promise health but practice harm. Only legislation, such as Section 9-102, can end this senseless system and protect vulnerable young children. The restrictive interpretation given Section 9-102 by the Maryland Court below, which defeats the state Legislature's purpose of child protection, should be reversed.

Respectfully submitted,

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APPENDIX

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Provisions For Use Of Closed Circuit Television, One-Way Screens or Two-Way Mirrors

1. Alabama: Ala. Code Sec. 15-25-3 (Supp. 1988)
2. Alaska: Alaska Stat. Sec. 12.45.046 (Supp. 1988)
3. Arizona: Ariz. Rev. Stat. Ann. Sec. 13-4253 (Supp. 1988)
4. California: Cal. Penal Code Sec. 1347 (West Supp. 1989)
5. Connecticut: Conn. Gen. Stat. Sec. 54-869 (West Supp. 1989)
6. Florida: Fla. Stat. Ann. Sec. 92.53 (West Supp. 1989)
7. Georgia: Ga. Code Ann. Sec. 81-1006.2 (Supp. 1989)
8. Hawaii: Haw. R. Evid. 616
9. Indiana: Ind. Code Ann. Sec. 35-37-4-8(d) (Burns Supp. 1989)
10. Iowa: Iowa Code Ann. Sec. 910.14 (West Supp. 1989)
11. Kansas: Kan. Stat. Ann. Sec. 2203434 (1988)
12. Kentucky: Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp. 1989)
13. Louisiana: La. Rev. Stat. Ann. Sec. 15:283 (West Supp. 1989)
14. Maryland: Md. Cts. & Jud. Proc. Code Ann. Sec 9-102 (Supp. 1988)
15. Massachusetts: Mass. Gen. Laws Ann. ch. 278, Sec. 16D (West Supp. 1989)
16. Minnesota: Minn. Stat. Ann. Sec. 595.02 (West Supp. 1988)
17. Mississippi: Miss. Code Ann. Sec. 13-1-405 (Supp. 1987)
18. New Jersey: N.J. Rev. Stat. Sec. 2A:84A-32.4 (West Supp. 1989)

19. New York: N.Y. Crim. Proc. Law Secs. 65.00-.03 (McKinney Supp. 1989)
20. Ohio: Ohio Rev. Code Ann. Sec. 2907.41 (Supp. 1987)
21. Oklahoma: Okla. Stat. Ann. tit. 22 Sec. 753 (West. Supp. 1989)
22. Pennsylvania: Pa. Cons. Stat. Ann. tit. 42 Sec. 5985 (Purdon Supp. 1989)
23. Rhode Island: R.I. Gen. Laws 11-37-13.2 (Supp. 1988)
24. Texas: Tex. Crim. Proc. Ann. art. 38.071 (Vernon Supp. 1989)
25. Utah: Utah Code Ann. Sec. 77-35-15.5 (Supp. 1989)
26. Vermont: Vt. R. Evid. 807

Provisions For Use of Videotaped Testimony

1. Alabama: Ala. Code. Sec. 15-25-2 (Supp. 1988)
2. Arizona: Ariz. Rev. Stat. Ann. Sec. 13-4253 (Supp. 1988)
3. Arkansas: Ark. Code Ann. Sec. 16-44-203 (1987)
4. California: Cal. Penal Code Sec. 1346 (West Supp. 1989)
5. Colorado: Col. Rev. Stat. Sec. 18-3-413 (1986)
6. Connecticut: Conn. Gen. Stat. Ann. Sec. 54-869 (West Supp. 1989)
7. Delaware: Del. Code Ann. tit. 11, Sec. 3511 (1987)
8. Florida: Fla. Stat. Sec. 92.53 (West Supp. 1989)
9. Hawaii: Haw. R. Evid. 616
10. Illinois: Ill. Ann. Stat. ch. 38, para. 106A-2 (Smith Hurd Supp. 1989)
11. Indiana: Ind. Code Ann. Sec. 35-37-4-8(d) (Burns Supp. 1989)
12. Iowa: Iowa Code Ann. Sec. 910.14 (West Supp. 1989)

13. Kansas: Kan. Stat. Ann. Sec. 22-3434 (1988)
14. Kentucky: Ky. Rev. Stat. Ann. Sec. 421.350 (Baldwin Supp. 1989)
15. Massachusetts: Mass. Gen. Laws Ann. ch. 278 Sec. 16D (West Supp. 1989)
16. Minnesota: Minn. Stat. Ann. Sec. 595.02 (West Supp. 1988)
17. Mississippi: Miss. Code Ann. Sec. 13-1-407 (Supp. 1987)
18. Missouri: Mo. Ann Stat. Secs. 491.680-687 (Vernon Supp. 1989)
19. Montana: Mont. Code Ann. Secs. 46-15-401 to -403 (1987)
20. Nevada: Nev. Rev. Stat. Ann. Secs. 174.227 and 174.229 (1986)
21. New Hampshire: N.H. Rev. Stat. Ann. Sec. 517.13-a (Supp. 1988)
22. New Mexico: N.M. Stat. Ann. Sec. 30-9-17 (1986)
23. Ohio: Ohio Rev. Code Ann. Sec. 2907-41 (Baldwin Supp. 1987)
24. Oklahoma: Okla. Stat. Ann. tit. 22 Sec. 753 (West Supp. 1989)
25. Pennsylvania: Pa. Cons. Stat. Ann. tit. 42 Sec. 5984 (Purdon Supp. 1989)
26. Rhode Island: R.I. Gen. Laws Sec. 11-37-13.2 (Supp. 1988)
27. South Carolina: S.C. Code Ann. Sec. 16-3-1530(G) (1984)
28. South Dakota: S.D. Code Ann. Sec. 23A-12-9 (1988)
29. Tennessee: Tenn. Code Ann. Sec. 24-7-116 (Supp. 1988)

30. Texas: Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989)
31. Utah: Utah Code Ann. Sec. 77-35-15.5 (Supp. 1989)
32. Vermont: Vt. R. Evid. 807
33. Wisconsin: Wis. Stat. Sec. 967-04(7)(a) (Supp 1988)
34. Wyoming: Wyo. Stat. Sec. 7-11-408 (1987)